

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

MICROSOFT CORPORATION, )  
                                )  
                                )  
Plaintiff,                 )  
                                )  
v.                            ) C.A. No. 07-090 (SLR)  
                                )  
ALCATEL BUSINESS SYSTEMS and ) **REDACTED VERSION**  
GENESYS TELECOMMUNICATIONS )  
LABORATORIES, INC.,         )  
                                )  
Defendants.                 )

**DECLARATION OF ROBERT J. MALIONEK**

MORRIS, NICHOLS, ARSH & TUNNELL LLP  
Jack B. Blumenfeld (#1014)  
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*Attorneys for Defendants*  
*Alcatel Business Systems and*  
*Genesys Telecommunications Laboratories, Inc.*

*Of Counsel:*

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Original Filing Date: August 31, 2007  
Redacted Filing Date: September 10, 2007

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

MICROSOFT CORPORATION, )  
                                )  
                                )  
*Plaintiff/Counterclaim Defendant,* )  
                                )  
                                )  
                                )  
                                )  
v.                             ) Civil Action No. 07-90-SLR.  
                                )  
                                )  
                                )  
ALCATEL BUSINESS SYSTEMS )  
                               and )  
GENESYS TELECOMMUNICATIONS )  
LABORATORIES, INC.,         )  
                                )  
*Defendants/Counterclaim Plaintiffs.* )

DECLARATION OF ROBERT J. MALIONEK

I, Robert J. Malioneck, declare:

1. I am currently an associate with Latham & Watkins LLP, counsel to Defendants and Counterclaim Plaintiffs Alcatel Business Systems and Genesys Telecommunications Laboratories, Inc., in this action. I am admitted to practice in the states of New York and California.
2. My office address is 885 Third Avenue, New York, New York.
3. On August 24, 2007, at 3:27 pm, I sent a letter by facsimile to Linda Kordziel of Fish & Richardson P.C. ("F&R"), bringing to her attention the F&R misconduct described in the Motion To Disqualify Fish & Richardson P.C. As Counsel For Microsoft, For Exclusion Of Evidence And For Other Sanctions and asking for a prompt response providing (1) a full

explanation and (2) all documents relating to the issue. A true and correct copy of my August 24 letter is attached as Exhibit A.

4. On August 27, 2007, at approximately 6:00 p.m. ET, having received no response to my August 24 letter, I called Linda Kordziel's office but was unable to reach her. I left a message with Ms. Kordziel's assistant that I needed to hear from Ms. Korziel, and that it was important.

5. On August 27, 2007, at 9:14 p.m. ET, I received a letter by facsimile from John E. Gartman of F&R, a true and correct copy of which is attached as Exhibit B.

6. On August 28, 2007, at 11:44 a.m. ET, I sent a letter, by facsimile, to Mr. Gartman. A true and correct copy of my August 24 letter is attached as Exhibit C.

7. As of August 31, 2007, F&R has not provided me or, as far as I am aware, any Alcatel counsel with either (1) an explanation for its misconduct or (2) all documents relating to the issue, as requested.

8. I declare under the penalty of perjury that the foregoing is true and correct.

Dated August 31, 2007



Robert J. Malonek

**EXHIBIT A**

Robert J. Mallonek  
Direct Dial: (212) 906-1816  
robert.mallonek@lw.com

## LATHAM & WATKINS LLP

August 24, 2007

53rd at Third  
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File No. 038857-0011

### BY FACSIMILE

Linda Liu Kordziel  
Fish & Richardson P.C.  
1425 K Street, N.W., Suite 1100  
Washington, D.C. 20005

Re: In re Certain Unified Communication Systems, Products Used with Such Systems, and Components Thereof (U.S. Int'l Trade Commission, Inv. No. 337-TA-598)

Microsoft Corporation v. Alcatel Business Systems and Genesys Telecommunications Laboratories, Inc. (D. Del., Civil Action No. 07-90-SLR)

Dear Ms. Kordziel:

I am a senior member of the Ethics Committee of Latham & Watkins LLP, and I work with Steven Cherny with regard to the representation of Alcatel-Lucent and its subsidiaries, including Alcatel Business Systems (collectively, "Alcatel"), in the above actions. We very recently learned of several instances of serious misconduct by your firm in the prosecution of these actions on behalf of Microsoft, and we have just completed a full investigation of information available to Alcatel regarding these actions. Based upon the information we have obtained to date, we believe that Fish & Richardson, P.C. ("F&R") has committed egregious ethical violations to the great prejudice of Alcatel. Given the seriousness of the ethical violations and their impact on Alcatel, we ask that your firm immediately withdraw from representing Microsoft in these actions, that Microsoft withdraw the July 11, 2007 and July 30, 2007 expert reports of Jack Chang and refrain from using Mr. Chang in any capacity in connection with these or any related actions, and that Microsoft immediately take steps to cure all prejudice to Alcatel, as discussed below. Absent such prompt action, we will seek these and other appropriate sanctions from the U.S. District Court of Delaware and the U.S. International Trade Commission.

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**LATHAM & WATKINS LLP**

As you know, F&R, acting through a third party, recently arranged for an installation of, among other products, an Alcatel OmniPCX Enterprise ("OXE") and the Alcatel OmniTouch Unified Communications software suite ("OTUC"), both accused products in these actions, through Alcatel's business partner, Alliance Telecommunications ("Alliance"). We are extremely troubled by the conduct, in connection with this installation, of the F&R attorneys directly responsible for litigating these actions on behalf of Microsoft. When the Alliance engineer and a senior Alcatel employee, Po Ching Lin, arrived at the customer address provided for the installation—which turned out to be F&R's offices (F&R had kept its name a secret until the date of the installation)—they were met by Rama Elluru, one of the F&R attorneys with lead responsibility in these actions. Over the course of several days and extending into the following weeks, Ms. Elluru and other F&R attorneys, including Joshua Pond and Ahmed Davis, questioned Mr. Lin regarding the products, focusing on the very functionality Microsoft has accused in the pending lawsuits. Upon learning of Mr. Lin's affiliation with Alcatel, F&R at that time should have, but did not, take steps to ensure that it did not run afoul of the many well-known and simple ethical rules governing the conduct of its lawyers, both in these actions and otherwise. These steps would have included contacting Latham & Watkins LLP to discuss whether F&R could communicate directly with Mr. Lin, informing Mr. Lin that F&R represents Microsoft, and further informing Mr. Lin that Microsoft and the F&R attorneys interrogating him were engaged in patent litigation with Alcatel with respect to the very products that were the subject of the installation.

Rather than take any of these actions, however, F&R misrepresented the purpose of the installation, interrogated Mr. Lin regarding the accused products over several days, and obtained confidential information for use in connection with Microsoft's prosecution of these actions against Alcatel. Nor did F&R see fit, after the fact, to contact our firm regarding its questioning of Mr. Lin. Indeed, at the conclusion of the installation, F&R contacted Alliance and specifically requested Mr. Lin's immediate return to F&R for additional "training." When Mr. Lin arrived to conduct this training, he was placed in a segregated conference room and F&R's interrogations continued (while Microsoft's technical expert, Jack Chang, was at F&R's offices preparing his expert report in these actions regarding the Alcatel system that Mr. Lin installed, and while F&R attorneys stepped in and out of the conference room in which Mr. Lin was placed, questioning Mr. Lin about the operation and configuration of the Alcatel system), again without disclosing to Mr. Lin F&R's role as outside counsel representing Microsoft in these actions.

We also understand that by engaging in such unethical and misleading conduct, F&R improperly obtained information which otherwise would have remained confidential to Alcatel. Worse, this information has been used improperly by F&R and Microsoft in furtherance of their litigation aims. Mr. Chang's deposition testimony yesterday made this abundantly clear.

The ethical rules which these F&R attorneys violated—including Rules 4.1, 4.2, 4.3 and 8.4 of the ABA Model Rules of Professional Conduct, as well as various ethics rules of the jurisdictions in which the attorneys are admitted to practice law—are designed to prevent exactly this kind of prejudice to Alcatel. Indeed, the damage caused by such unethical conduct is the reason courts issue sanctions, including—at a minimum—the sanctions appropriate in these

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Page 3

LATHAM & WATKINS LLP

circumstances: the disqualification of the firm committing the violations and the exclusion of any evidence, including expert testimony, based in any way upon the misconduct.

F&R must therefore withdraw from representing Microsoft in these actions, Mr. Chang must be excluded from any involvement in these and any related actions on Microsoft's behalf, and Microsoft may make no use of the fruit of this misconduct. F&R and/or Microsoft must inform us immediately that F&R and Microsoft will take these actions, and detail all steps being taken to prevent Microsoft's capitalizing upon this gross misbehavior.

So that the remedy may be fully effective, we, the District Court and the International Trade Commission need to understand the full reach of these ethical violations. Please, therefore, immediately provide us with the identities of all F&R and Microsoft employees or agents who are aware of these contacts with Mr. Lin, and produce to us all documents and evidence of any kind, including notes taken during the interrogations and otherwise, memoranda, correspondence (including but not limited to e-mails), communications, recordings, reports, billing records and anything else relating in any way to (1) F&R's ordering and installation of the products; (2) any communications and interaction between F&R and Alliance or any Alcatel representative, including Mr. Lin, or information derived from such communications and interaction; (3) any communications and interaction between F&R (and/or its co-counsel) and Microsoft regarding the foregoing; and (4) any use by F&R or Microsoft regarding the same. *See, e.g., Faision v. Thornton*, 863 F. Supp. 1204, 1218 (D. Nev. 1992) ("plaintiffs and their counsel shall produce for examination and copying the originals of any documents provided by, shown to, or discussed with [represented party] during the course of [their] contacts with him, as well as all originals and copies of statements, notes, memoranda, tape recordings, correspondence, facsimile transmission cover sheets, and all other recordings and documents generated as a result of [their] contacts," ordering disqualification of firm); *Penda Corp. v. STK, L.L.C.*, 2004 U.S. Dist. LEXIS 13577, 20-21 (E.D. Pa. July 16, 2004) (ordering production by plaintiff of information and all "documents, recordings, notes, and memoranda relating to or generated as a result of the ex parte contact," including the "fruit" of that contact; precluding use of all such information and documents because it would be "inequitable to permit the plaintiff to keep any advantage it may have gained from the ethical violation").

Given the circumstances, we need to hear from you promptly. If we do not hear from you by the close of business on Monday, August 27, Alcatel will seek appropriate relief from the ITC and the U.S. District Court for the District of Delaware.

Very truly yours,

  
Robert J. Malionek  
of LATHAM & WATKINS LLP

**EXHIBIT B**

08/27/07 MON 18:14 FAX 8586785099

FISH &amp; RICHARDSON P.C.

002

## FISH &amp; RICHARDSON P.C.

Frederick P. Fish  
1855-1930W.K. Richardson  
1859-1951VIA FACSIMILE

August 27, 2007

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John E. Gartman  
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Email  
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**Re:** Microsoft v. Alcatel-Lucent (ITC) Certain Unified Communications Systems,  
 Products Used with Such Systems and Components Thereof 337-TA-598

Microsoft Corporation v. Alcatel Business Systems and Genesys  
 Telecommunications Laboratories, inc. (D.Del., Civil Action No. 07-90-SLR)

Dear Mr. Malonek:

ATLANTA  
 AUSTIN  
 BOSTON  
 DALLAS  
 DELAWARE  
 NEW YORK  
 SAN DIEGO  
 SILICON VALLEY  
 TWIN CITIES  
 WASHINGTON, DC

This responds to your late Friday letter to Linda Kordziel, asserting "egregious ethical violations to the great prejudice of Alcatel" and threatening disciplinary charges against my firm. We have undertaken a full investigation of your allegations and will provide a response when that investigation is complete. In the meantime, we suggest that your firm double check the accuracy of the facts underlying your letter, some of which are demonstrably wrong.

Sincerely,

John E. Gartman

JEG/ejc

10767825.doc

**EXHIBIT C**

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## LATHAM & WATKINS LLP

August 28, 2007

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Madrid          Silicon Valley  
Milan           Singapore  
Moscow          Tokyo  
Munich         Washington, D.C.

File No. 038557-0011

### BY FACSIMILE

John E. Gartman  
Fish & Richardson P.C.  
12390 El Camino Real  
San Diego, CA 92130

Re: In re Certain Unified Communication Systems, Products Used with Such Systems, and Components Thereof (U.S. Int'l Trade Commission, Inv. No. 337-TA-598)

Microsoft Corporation v. Alcatel Business Systems and Genesys Telecommunications Laboratories, Inc. (D. Del., Civil Action No. 07-90-SLR)

Dear Mr. Gartman:

In your letter sent last night, you stated that some of the facts in my August 24, 2007 letter to Linda Kordziel are "demonstrably wrong." Please let me know, by 5:00 p.m. ET today, the facts to which you refer. Also, I reiterate my request for any documents that relate to the events set forth in my letter.

You also stated that I threatened "disciplinary charges" against your firm. That is incorrect. I made no such threat. What I made clear in my letter, and what I reiterate now, is that this is a serious matter that must be brought to the attention of the tribunals in which F&R and Microsoft continue to capitalize upon the misconduct, if not rectified immediately. And while Alcatel is attempting to address this issue without having to involve the pertinent tribunals, your delay in responding will only compound the prejudice to Alcatel. Thus, if we are not able to resolve the situation promptly, we intend to bring the facts to the attention of the ITC and the Court.

Sincerely,

Robert J. Malonek  
of LATHAM & WATKINS LLP

**CERTIFICATE OF SERVICE**

I, Maryellen Noreika, hereby certify that on September 10, 2007 I electronically filed the foregoing document, which will send notification of such filing(s) to the following:

Thomas L. Halkowski, Esquire  
FISH & RICHARDSON P.C.

I also certify that copies were caused to be served on September 10, 2007 upon the following in the manner indicated:

**BY ELECTRONIC MAIL**  
**and HAND DELIVERY**

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FISH & RICHARDSON P.C.  
919 N. Market Street  
Suite 1100  
Wilmington, DE 19801

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Brian R. Nester, Esquire  
Jeffrey R. Whieldon, Esquire  
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*/s/ Maryellen Noreika*  
\_\_\_\_\_  
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